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**FILED**

OCT 23 2008

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 7  
)  
) No. 4:08-bk-03311-EWH  
)  
ENRICO LATONE, )  
)  
)  
Debtor. ) **MEMORANDUM DECISION**  
)  
\_\_\_\_\_ )

**I. INTRODUCTION**

The U.S. Trustee argues that the Debtor's case should be dismissed because he makes payments on outstanding 401(k) loans. However, such payments could not be used to fund a Chapter 13 plan and, therefore, no cause has been established which would justify the dismissal or conversion of the Debtor's Chapter 7 case.

**II. FACTS AND PROCEDURAL HISTORY**

Debtor filed a Chapter 7 Petition on March 28, 2008. He filed a Form B22A on March 28, 2008, which indicates that his income is below the median income for a one-person household in Arizona. The Debtor owes primarily consumer debts. Therefore, under § 707(b)(1), his case may be dismissed if it is determined that it is abusive. See § 707(b)(1). Because the Debtor is a below median income debtor, there is no

1 presumption of abuse under § 707(b)(2)(A).<sup>1</sup> On July 1, 2008, the Office of the U.S.  
2 Trustee filed a motion seeking to dismiss Debtor's case under § 707(b)(3). The Debtor  
3 timely filed a response, and the matter is now ready for decision.

### 4 5 **III. ISSUES**

6 Is the Debtor's case an abuse of the provisions of Chapter 7 because he is making  
7 payments on 401(k) loans and such payments are not deductible under the Chapter 7  
8 version of the means test?

### 9 10 **IV. STATEMENT OF JURISDICTION**

11 Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2)(A).

### 12 13 **V. DISCUSSION**

14 The Trustee seeks to have the Debtor's case dismissed under the so-called  
15 "totality of the circumstances" test of § 707(b)(3). No statutory guidance is provided in  
16 § 707(b)(3)(B) as to the factors to consider in evaluating the totality of the  
17 circumstances, other than they are to be considered as they relate to the Debtor's  
18 "financial situation." Also, there is relatively little Ninth Circuit case law interpreting the  
19 phrase "totality of the circumstances" under BAPCPA.<sup>2</sup> Prior to BAPCPA, the Ninth  
20 Circuit looked to the "totality of the circumstances" to interpret the term "substantial  
21 abuse" in former § 707(b). See In re Price, 353 F.3d 1135, 1139-40 (9th Cir. 2004).  
22 Because Congress retained the phrase "totality of the circumstances" in BAPCPA, courts  
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24 <sup>1</sup> Unless otherwise indicated, all "Code," chapter and section references are to the  
25 Bankruptcy Code. 11 U.S.C. §§ 101 - 1330, prior to its amendment by the Bankruptcy Abuse  
26 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Oct. 17, 2005).

27 <sup>2</sup> In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection  
28 Act, Pub. L. 109-8.

1 have looked to pre-BAPCPA case law to construe the meaning of that phrase under  
2 § 707(b)(3). See In re Hare, 2007 WL 201249 (Bankr. E.D. Cal., 2007), In re Mitchell,  
3 357 B.R. 142 (Bankr. C.D. Cal., 2006) and In re Ashraf, 367 B.R. 151 (Bankr. D. Ariz.,  
4 2007). The pre-BAPCPA factors considered by these courts include: (1) whether the  
5 debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan  
6 which would pay a substantial portion of the unsecured claims; (2) whether the debtor's  
7 petition was filed as a consequence of illness, disability, unemployment, or some other  
8 calamity; (3) whether the schedules suggest the debtor obtained cash advancements and  
9 consumer goods on credit exceeding his or her ability to repay them; (4) whether the  
10 debtor's proposed family budget is excessive or extravagant; (5) whether the debtor's  
11 statement of income and expenses is misrepresentative of the debtor's financial  
12 condition; and (6) whether the debtor has engaged in eve-of-bankruptcy purchases. In re  
13 Price, 353 F.3d at 1139-40.

14 The only circumstance identified by the U.S. Trustee in her motion to dismiss is  
15 the Debtor's monthly deduction of \$1,483 for repayment of various 401(k) loans. The  
16 U.S. Trustee asserts that such deductions are improper for a Chapter 7 debtor. The U.S.  
17 Trustee further argues that if the amount the Debtor is repaying on the 401(k) loans was  
18 added back into the Debtor's monthly income, he would have surplus income of \$1,518  
19 per month, which could be used to fund \$91,080 over the life of a hypothetical  
20 Chapter 13 plan.

21 Courts are split on whether a debtor's ability to fund a hypothetical Chapter 13  
22 plan remains part of the "totality of the circumstances" analysis where there is no  
23 presumption of abuse because the debtor has passed the means test. Contrast, In re  
24 Nockets, 357 B.R. 497, 506 (Bankr. E.D. Wis., 2006) (to apply the means test, dislike  
25 the result, and then examine the debtor's ability to fund a Chapter 13 plan under  
26 § 707(b)(3) renders the means test "surplusage") with In re Sullivan, 370 B.R. 314, 321  
27  
28

1 (Bankr. D. Mont., 2007) ([A] a debtor's ability to pay is still an important factor under  
2 § 707(b)(3), notwithstanding the means test).

3 Pre-BAPCPA, in the Ninth Circuit, ability to pay was a ground sufficient by itself  
4 to support dismissal for "substantial abuse." In re Kelly, 841 F.2d 908 (9th Cir. 1988).  
5 Even though BAPCPA lowers the statutory standard in § 707(b) to "abuse," several post-  
6 BAPCPA courts in the Ninth Circuit have held that the ability to pay will support  
7 dismissal. See In re Maya, 374 B.R.750, 754 (Bankr. S.D. Cal., 2007) (finding that  
8 debtors have at least \$733.72 of monthly disposable income and that allowing debtors  
9 relief under Chapter 7 with that much monthly disposable income would constitute an  
10 abuse under the totality of circumstances of the debtors' financial situation) and In re  
11 Hickman, 2008 WL 2595182 (Bankr. W.D. Wash., 2008) (finding abuse when the  
12 debtor has the ability to pay creditors from future disposable income).

13 The issue need not, however, be reached in this case because the money the  
14 Debtor is paying on his 401(k) loans could not be used to fund a Chapter 13 plan.  
15 Section 1322(f) specifically excludes from the definition of disposable income money  
16 required to pay 401(k) loans. It is true that Form B22A, which is used in Chapter 7 cases  
17 to calculate the means test, does not include a line item permitting a deduction for  
18 repayment of 401(k) loans. However, Form B22C, which must be used in Chapter 13  
19 cases does permit a deduction for such repayments at line 55. If the Debtor converted  
20 his case to a Chapter 13, the very amounts the U.S. Trustee argues could be used to  
21 fund the hypothetical Chapter 13 plan, would be excluded from a disposable income  
22 calculation and could not be used to fund the Chapter 13 plan.

23 In a case similar to this one, the court noted that to grant the U.S. Trustee's  
24 motion to dismiss would lead to an absurd result:

25 [T]he debtor could refile its case under Chapter 13 and unsecured creditors  
26 would be paid nothing based upon the provisions of Sections 1322(f) and  
27 1325 and the deference accorded by Congress to 401(k) contributions and  
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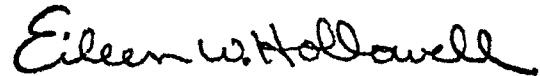
1 loan repayments. Alternatively, if the court were to convert the case to a  
2 Chapter 13 "with the debtor's consent," the same result would obtain.

3 In re Skvorecz, 369 B.R. 638 at 644 (D. Colo. 2007). Assuming that ability to pay is  
4 still relevant to the "totality of the circumstances" test, that ability must be real. In this  
5 case, the "excess" money that the Debtor has could not be used to fund a Chapter 13  
6 plan. Therefore, the Debtor's filing of a Chapter 7 case is not an abuse of Chapter 7.

7  
8 **VI. CONCLUSION**

9 The U.S. Trustee has not demonstrated that the Debtor has the ability to fund a  
10 Chapter 13 plan and, therefore, the request to dismiss the Debtor's case is DENIED. A  
11 separate order consistent with this decision will be entered this date.

12 DATED: October 23, 2008

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14  
15 Eileen W. Hollowell  
U.S. Bankruptcy Judge

16 Notice to be sent through the  
17 Bankruptcy Noticing Center  
("BNC") to the following:

18 Clint W. Smith  
19 Clint W. Smith, P.C.  
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